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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re MARIO D. GAULDIN on Habeas
Corpus.

D056779

(Super. Ct. No. HC 19711)

Petition for writ of habeas corpus. Relief granted in part and denied in part.

This case is before us a second time. In his "supplemental petition for writ of habeas corpus," Mario Gauldin incorporates by reference the factual and procedural history we set forth in our prior unpublished opinion (*People v. Gauldin* (Mar. 5, 2009, D052093 & D053283) [nonpub. opns.]), which we take judicial notice of under Evidence Code section 452. (*In re Clark* (1993) 5 Cal.4th 750, 798 & fn. 35.) Accordingly, we summarize the relevant facts here.

In this habeas petition, Gauldin contends: (1) the prosecution presented false trial evidence that he owned a pair of jeans with the victim's DNA, thus violating his due process rights; (2) the trial court erroneously refused to allow him to try on the pair of jeans during trial, although it allowed the prosecutor's request that Gauldin hold the jeans

up to his waist, thus violating his 14th Amendment right to present a meaningful defense; (3) the DNA report was admitted into evidence at trial in the absence of the criminalist who prepared it and in violation of *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ____ [129 S. Ct. 2527] and his constitutional confrontation right; (4) he received ineffective assistance of counsel because his trial attorney failed to: bar him from sitting in handcuffs in the juror box during preliminary hearing, interview potential prosecution witnesses, cross-examine the police property impound officer, investigate the law regarding conspiracy, and seek a retest of the DNA evidence; (5) the trial court imposed an illegal joint and several restitution fine and failed to ascertain his ability to pay excessive restitution fines; (6) under Penal Code¹ section 654, the trial court improperly sentenced him consecutively for felony evasion and being a felon in possession of a firearm; (7) the trial court erroneously imposed two enhancements on the count one robbery conviction for gun use under section 12022.53, subd. (b), and box cutter use under section 12022, subd. (b)(1), in violation of section 1170.1, subdivision (f); (8) his appellate attorney rendered ineffective assistance of counsel because he did not raise the various issues raised in this writ petition. We grant the requested relief in part.

FACTUAL AND PROCEDURAL BACKGROUND

On December 11, 2006, Jarrod Buchanan answered the front door of his Rancho Penasquitos home. Gauldin and Kimberlee Snowden were at the door dressed in uniforms from a cleaning company Buchanan had hired. Buchanan invited them inside

¹ All statutory references are the Penal Code unless otherwise indicated.

and after some moments Gauldin came towards Buchanan, holding and waving a box cutter as he grabbed Buchanan by the sleeve and pushed him into the bathroom.

Buchanan managed to grab his gun. Gauldin yelled "gun" and jumped on Buchanan, slashing Buchanan's hand several times with the box cutter.

In 2007, a jury found Gauldin guilty of burglary, robbery, assault with a deadly weapon, grand theft of a firearm, making a criminal threat and recklessly evading a police officer. The jury also found true that in committing the burglary he personally used a firearm and a box cutter. The trial court found him guilty of the charge of being a felon in possession of a firearm, and he admitted he had two strikes and had served two prior prison terms. The trial court dismissed one of the strikes and sentenced him to a total prison term of 27 years 8 months, including 10 years for the personal use of a firearm enhancement, and 1 year for the use of a box cutter enhancement.

In the earlier appeal, we rejected Gauldin's arguments that the trial court abused its discretion when it denied his request to sit in the audience during the victim's in-court identification; erred in using his prior juvenile adjudications as strikes, and in imposing consecutive terms on the convictions for evading an officer and being a felon in possession of a firearm. We denied his companion petition for writ of habeas corpus, in which he contended his trial counsel was ineffective for failing to object to the in-court identification procedure used for his cohorts.

The California Supreme Court denied his petition for review of our decision. Gauldin later filed a petition for writ of habeas corpus in the trial court, which denied it.

DISCUSSION

Based on *In re Clark*, *supra*, 5 Cal.4th at pp. 765-769, we reject all but one of Gauldin's contentions because they are successive collateral attacks on the final judgment, or could have been but were not presented in his previous appeal and writ petition. However, we agree he received ineffective assistance from his trial and appellate attorneys, who did not contest the imposition of the two enhancements on the robbery conviction for gun use under section 12022.53, subd. (b), and box cutter use under section 12022, subd. (b)(1). (*See In re Clark*, at p. 779 [In limited circumstances, consideration may be given to a claim that prior habeas corpus counsel did not competently represent a petitioner].)

A defendant seeking relief on the basis of ineffective assistance of counsel must show both that counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings. (*People v. Fosselman* (1983) 33 Cal.3d 572, 584; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-696 (*Strickland*).)

Section 1170.1, subdivision (f) provides that, "[w]hen two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense." This language prevents execution of sentences for multiple enhancements. (*People v. Jones* (2000) 82 Cal.App.4th 485, 492-493; accord, *People v. Crites* (2006) 135 Cal.App.4th 1251, 1255.) In the *Jones* case, the trial court

imposed enhancements for personal use of a handgun (§ 12022.5) and personal use of a knife (§ 12022, subd. (b)) with respect to the same offense against the same victim. The appellate court concluded that section 1170.1 required the court to stay the lesser section 12022, subdivision (b) enhancement. (*People v. Jones*, at p. 493.)

Citing to no authority for rejecting the holding in *Jones*, the People counter that "the more reasonable interpretation of [section 1170.1] limits its reach to multiple enhancements imposed for being armed with, and using the same weapon in the same offense. Multiple enhancements should not be prohibited for the use of a firearm and the separate use of a knife in the robbery, however, since the separate use of a different weapon represents a discrete act committed with a discrete criminal intent." We agree with the reasoning of the *Jones* court and conclude that the one-year enhancement for Gauldin's box cutter use must be stayed. Accordingly, we also conclude that Gauldin's trial and appellate counsel were ineffective for not raising the sentencing error earlier, despite the plain language of section 1170.1, subdivision (f), and its interpretation in the *Jones* decision, which was decided approximately seven years before Gauldin was sentenced in this matter. Under *Strickland, supra*, 466 U.S. 668, he would be prejudiced if the error was not corrected.

DISPOSITION

The judgment is modified to reflect that the sentence on the count one enhancement alleging box cutter use is stayed. The trial court is directed to amend the abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects the habeas petition is denied.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.